Tan Sri Rozali bin Ismail v Abdul Hadi bin Hamad & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-12ANCvC-112–04 OF 2022
LEONG WAI HONG JC
31 JANUARY 2023

Civil Procedure — Striking out — Writ and statement of claim — Syariah Lower Court appointed Hakam pursuant to s 48 of the Islamic Family Law (Federal Territories) Act 1984 — Syariah Lower Court ordered divorce of appellant and his wife — Appellant filed appeal to Syariah High Court — Appellant filed civil suit against Hakam for malicious falsehood, negligence and breach of statutory duty for statements made during divorce proceedings — Hakam filed application to strike out appellant's civil suit — Whether Hakam was protected by judicial immunity — Whether civil suit was abuse of process of court — Whether civil suit was duplicity of proceedings — Whether defence of absolute privilege based on judicial privilege also referred to as courtroom privilege was available to Hakam — Courts of Judicature Act 1964 ss 3, 14(1) & (2) — Islamic Family Law (Federal Territories) Act 1984 s 48 — Rules of Court 2012 O 18 r 19

The appellant and his ex-wife were the parties in a Syariah Lower Court ('the SLC') divorce proceedings ('the proceedings') whereas the respondents were the Hakam appointed by the court pursuant to s 48 of the Islamic Family Law (Federal Territories) Act 1984 ('Act 303'). At the end of the proceedings, the SLC had made an order of divorce. Aggrieved by the said decision, the appellant filed a notice of appeal against the said decision to the Syariah High Court ('SHC') and at the same time, the appellant filed two suits ('the civil suit') at the sessions court against the respondents for malicious falsehood, negligence and breach of statutory duty for statements made during the proceedings. The respondents then applied to strike out the civil suit pursuant to O 18 r 19 of the Rules of Court 2012 and the said application was allowed by the sessions court, hence, the present appeal. The issues to be determined in the present appeal were: (a) whether the Hakam was protected by judicial immunity; (b) whether the civil suit was an abuse of the process of the court on the ground that the conduct of a court appointed Hakam was a matter exclusively within the jurisdiction of the Syariah Court under art 121(1A) of the Federal Constitution; (c) whether the civil suit was a duplicity of proceedings as the appellant had filed a notice of appeal to the SHC against the decision of the SLC; and (d) whether the defence of absolute privilege based on judicial privilege also referred to as courtroom privilege was available to the Hakam.

Held, dismissing the appeal with costs subject to allocatur:

(1) Judicial immunity was a principle in common law. It was codified by the Legislature in the form of s 14 of the Courts of Judicature Act 1964 ('the CJA'). The court opined that a Hakam could come within the second limb of s 14(1) of the CJA if he was a 'person acting judicially in the discharge of his judicial duty'. It was also significant that s 14(2) of the CJA used the small 'c' for 'court' and not the big 'C' for 'Court'. This was because under s 3 of the CJA, the word 'Court' had been defined to mean the Federal Court, the Court of Appeal or the High Court. The intention of the Legislature therefore must be that judicial immunity was not confined to officers of the Federal Court, the Court of Appeal or the High Court but extended to officers of 'any court' including the sessions court, magistrates court and Syariah Courts (see paras 38, 50 & 57).

(2) The court found that a court appointed Hakam was protected by common law judicial immunity as the said Hakam was acting judicially in the discharge of his judicial duty when he arbitrated between the divorcing couple in arriving at his recommendation whether to order a divorce under Syariah law pursuant to s 48 of Act 303 and the Syariah Court practice direction No 1 of 2006. It was clear from the two statements of claim filed by the appellant at para 13 that the acts of the respondents as court appointed Hakams that he was complaining of were acts committed during the Syariah divorce proceedings. Therefore, the acts were committed when the respondents were acting judicially in the discharge of their judicial duty. The respondents were therefore protected by common law judicial immunity (see paras 63–65).

(3) In relation to the statutory judicial immunity, based on the authority conferred pursuant to s 48 of Act 303 and the Syariah Court practice direction No 1 of 2006 on the Hakam as well as his duty when arbitrating constant quarrels (*shiqaq*) between the parties to a marriage, whether the couple should or should not be granted a divorce, the court found that the Hakam was a person acting judicially in the discharge of his judicial duty in the Syariah Court proceedings. Therefore, under s 14(1) of the CJA, the Hakam was entitled to judicial immunity. In addition, the Hakam also entitled to judicial immunity pursuant to s 14(2) of the CJA because he was an officer of a Syariah Court, and he was executing the lawful orders of a Syariah Court judge. On this ground of judicial immunity alone, the writs ought to be struck out and the appeal ought to be dismissed (see paras 67–70 & 72).

(4) The appellant had filed an appeal to the SHC and applied for a stay of execution against the decision of the SLC. In the court's opinion, the said appeal must necessarily be against the recommendation for divorce and alleged falsehoods uttered by the Hakams. Therefore, there was a clear duplicity of proceedings. It was undesirable that two different courts were

asked to decide on the same or similar issues. Therefore, on this ground of duplicity of proceedings, the appeal should also be dismissed (see paras 75–77).

(5) A defence of absolute privilege was a complete bar to an action for defamation. This was so notwithstanding how false or malicious the words complained of may be. In this appeal the defence of absolute privilege was based on judicial privilege also known as courtroom privilege. Under this defence, no one could sue in a civil court the judge, the Hakam, the parties, the counsel or the witnesses for all matters that were said or done coram judice in a Syariah Court proceedings. That included everything that was said or done in the course of proceedings by judges, parties, counsel and witnesses, and included the contents of documents put in as evidence in a Syariah Court proceedings. This defence was available to the Hakams as it was clear from the two statements of claim filed by the appellant at para 13 that the acts of the respondents as Hakams that he was complaining of were acts committed during the Syariah divorce proceedings. On this ground, the appeal ought to be dismissed (see paras 82, 84–87 & 91).

[Bahasa Malaysia summary

Perayu dan bekas isterinya adalah pihak-pihak dalam prosiding perceraian Mahkamah Rendah Syariah ('MRS') ('prosiding tersebut') manakala responden-responden adalah Hakam yang dilantik oleh mahkamah menurut s 48 Akta Undang-Undang Keluarga Islam (Wilayah Persekutuan) 1984 ('Akta 303'). Pada akhir prosiding, MRS telah membuat perintah cerai. Terkilan dengan keputusan tersebut, perayu memfailkan notis rayuan terhadap keputusan tersebut kepada Mahkamah Tinggi Syariah ('MTS') dan pada masa yang sama, perayu memfailkan dua saman ('saman sivil tersebut') di mahkamah sesyen terhadap responden-responden bagi kepalsuan berniat jahat, kecuaian dan pelanggaran kewajipan berkanun bagi kenyataan yang dibuat semasa prosiding tersebut. Responden-responden kemudiannya memohon untuk membatalkan saman sivil tersebut menurut A 18 k 19 Kaedah-Kaedah Mahkamah 2012 dan permohonan tersebut dibenarkan oleh mahkamah sesyen, justeru, rayuan semasa. Isu-isu yang perlu ditentukan dalam rayuan ini ialah: (a) sama ada Hakam dilindungi oleh kekebalan kehakiman; (b) sama ada saman sivil tersebut adalah penyalahgunaan proses mahkamah atas alasan bahawa kelakuan Hakam yang dilantik oleh mahkamah adalah perkara yang secara eksklusif dalam bidang kuasa Mahkamah Syariah di bawah perkara 121(1A) Perlembagaan Persekutuan; (c) sama ada saman sivil tersebut adalah penduaan prosiding kerana perayu telah memfailkan notis rayuan kepada MTS terhadap keputusan MRS; dan (d) sama ada pembelaan keistimewaan mutlak berdasarkan keistimewaan kehakiman yang juga disebut sebagai keistimewaan kamar mahkamah tersedia kepada Hakam.

Diputuskan, menolak rayuan dengan kos tertakluk kepada alokatur:

(1) Kekebalan kehakiman adalah satu prinsip dalam undang-undang biasa. Ia dikodifikasikan oleh Badan Perundangan dalam bentuk s 14 Akta Mahkamah Kehakiman 1964 ('AMK'). Mahkamah berpendapat bahawa seorang Hakam boleh tergolong dalam bahagian kedua s 14(1) AMK jika dia adalah 'orang yang bertindak secara kehakiman dalam melaksanakan tugas kehakimannya'. Ia juga penting bahawa s 14(2) AMK menggunakan 'c' kecil untuk 'court' dan bukan 'C' besar untuk 'Court'. Ini kerana di bawah s 3 AMK, perkataan 'Court' telah ditakrifkan sebagai Mahkamah Persekutuan, Mahkamah Rayuan atau Mahkamah Tinggi. Oleh itu, niat Badan Perundangan mestilah bahawa kekebalan kehakiman tidak terhad kepada pegawai Mahkamah Persekutuan, Mahkamah Rayuan atau Mahkamah Tinggi tetapi diperluaskan kepada pegawai 'mana-mana mahkamah' termasuk mahkamah sesyen, mahkamah majistret dan Mahkamah Syariah (lihat perenggan 38, 50 & 57).

(2) Mahkamah mendapati bahawa Hakam yang dilantik oleh mahkamah dilindungi oleh kekebalan kehakiman undang-undang biasa kerana Hakam tersebut bertindak secara kehakiman dalam menjalankan tugas kehakimannya apabila dia membuat timbang tara antara pasangan yang bercerai dalam mencapai syornya sama ada untuk memerintahkan perceraian di bawah undang-undang Syariah menurut s 48 Akta 303 dan arahan amalan Mahkamah Syariah No 1/2006. Jelas daripada dua pernyataan tuntutan yang difailkan oleh perayu di perenggan 13 bahawa perbuatan responden-responden sebagai Hakam yang dilantik oleh mahkamah yang diadukannya adalah perbuatan yang dilakukan semasa prosiding perceraian Syariah. Oleh itu, perbuatan tersebut dilakukan apabila responden-responden bertindak secara kehakiman dalam melaksanakan tugas kehakiman mereka. Oleh itu, responden-responden dilindungi oleh kekebalan kehakiman undang-undang biasa (lihat perenggan 63–65).

(3) Berkenaan dengan kekebalan kehakiman berkanun, berdasarkan kuasa yang diberikan menurut s 48 Akta 303 dan arahan amalan Mahkamah Syariah No 1/2006 mengenai Hakam serta kewajipannya apabila menimbang tara pertelingkahan berterusan (*shiqaq*) antara pihak-pihak kepada perkahwinan, sama ada pasangan tersebut patut atau tidak patut dijatuhkan cerai, mahkamah mendapati bahawa Hakam adalah seorang yang bertindak secara kehakiman dalam menjalankan tugas kehakimannya dalam prosiding Mahkamah Syariah. Oleh itu, di bawah s 14(1) AMK, Hakam berhak mendapat kekebalan kehakiman. Di samping itu, Hakam juga berhak mendapat kekebalan kehakiman menurut s 14(2) AMK kerana beliau adalah seorang pegawai Mahkamah Syariah, dan beliau sedang melaksanakan perintah yang sah dari seorang

hakim Mahkamah Syariah. Atas dasar kekebalan kehakiman ini sahaja, writ-writ tersebut harus dibatalkan dan rayuan harus ditolak (lihat perenggan 67–70 & 72).

(4) Perayu telah memfailkan rayuan kepada MTS dan memohon penangguhan pelaksanaan terhadap keputusan MRS. Pada pendapat mahkamah, rayuan tersebut semestinya terhadap syor untuk perceraian dan dakwaan kepalsuan yang diucapkan oleh Hakam. Oleh itu, terdapat penduaan prosiding yang jelas. Adalah tidak diingini bahawa dua mahkamah berbeza diminta untuk memutuskan isu yang sama atau serupa. Oleh itu, atas alasan penduaan prosiding ini juga rayuan harus ditolak (lihat perenggan 75–77).

(5) Pembelaan keistimewaan mutlak adalah penghalang lengkap kepada tindakan fitnah. Ianya kekal sedemikian walaupun betapa palsu atau jahatnya perkataan yang diadukan tersebut. Dalam rayuan ini pembelaan keistimewaan mutlak adalah berdasarkan keistimewaan kehakiman yang juga dikenali sebagai keistimewaan kamar mahkamah. Di bawah pembelaan ini, tiada sesiapa pun boleh menyaman hakim, Hakam, pihak-pihak, peguam atau saksi-saksi di mahkamah sivil bagi semua perkara yang dikatakan atau dilakukan coram judice dalam prosiding Mahkamah Syariah. Itu termasuk semua yang dikatakan atau dilakukan dalam perjalanan prosiding oleh hakim, pihak-pihak, peguam dan saksi-saksi, dan termasuk kandungan dokumen yang dimasukkan sebagai keterangan dalam prosiding Mahkamah Syariah. Pembelaan ini tersedia kepada Hakam kerana jelas daripada dua pernyataan tuntutan yang difailkan oleh perayu di perenggan 13 bahawa perbuatan responden-responden sebagai Hakam yang diadukannya adalah perbuatan yang dilakukan semasa prosiding perceraian Syariah. Atas alasan ini, rayuan perlu ditolak (lihat perenggan 82, 84–87 & 91).]

Cases referred to

Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor [2004] 2 MLJ 529, FC (refd)

BHLB Trustee Bhd & Anor v HSBC (M) Trustee Bhd & Ors [2006] 4 MLJ 48, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Harcharan Singh a/l Sohan Singh v Ranjit Kaur a/p S Gean Singh [2010] MLJU 1079, HC (refd)

Ho Kok Thin & Ors v The Sheriff/Registrar of the High Court Borneo & Anor [1989] 3 MLJ 181, HC (refd)

Hodan-R Sdn Bhd v Dato' Mohd Hishamudin Hj Mohd Yunus [2007] 2 CLJ 701, HC (refd)

Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor [2006] 1 MLJ 464, HC (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Law Hock Hua and Anor v Timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur [2006] MLJU 347, HC (refd)
Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd [1988] 2 MLJ 184, SC (refd)
Lincoln v Daniels [1961] 3 All ER 740, CA (refd)
Mahon and another v Rahn and others (No 2) [2000] 2 All ER (Comm) 1, CA (refd)
Munster v Lamb (1883) 11 QBD 588, CA (refd)
Oversea-Chinese Banking Corporation Ltd v National Union of Bank Employees & Ors [1985] 1 MLJ 439 (refd)
Roshini Ochie bt Mohd Melvyn v Ketua Pendaftar Mahkamah Syariah Wilayah Persekutuan & Ors [2021] MLJU 2263, HC (refd)
Sirros v Moore and others [1975] QB 118, CA (refd)
Tee Yam @ Koo Tee Yam v Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2005] 5 MLJ 645, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 7, 12(2), 14, 14(1), (2), (3), 15, 16, 16(b), Schedule, paras 5, 11, 17
Emergency (Public Order and Prevention of Crime) Ordinance 1969
Federal Constitution art 121(1A)
Islamic Family Law (Federal Territories) Act 1984 s 48
Rules of Court 2012 O 18 r 19

Abdul Razak Muhidin (with Lim Choon Khim, Nini Shirma Rahmat, Chin Yan Leng and Elyazura bt Md Shaarani) (CK Lim Law Chambers) for the appellant.
Mohd Ashraf bin Abd Hamid (Federal Counsel, Attorney General's Chambers) for the respondent.

Leong Wai Hong JC:

INTRODUCTION

[1] This appeal filed by the appellant Tan Sri Rozali bin Ismail is against the sessions court decision to strike out his two writs of summon under O 18 r 19 of the ROC 2012. I had dismissed the appeal on 10 January 2023.

[2] The appellant had appealed to the Court of Appeal. These are my grounds of decision. Parties will be cited as they were cited at the court below.

[3] This appeal deals with a short but important legal point.

[4] In essence, can a spouse in a divorce proceeding heard at the Kuala

Lumpur Syariah Lower Court and concluded with an order of divorce subsequently file a suit in the civil court against the court appointed Hakam for malicious falsehoods, negligence and breach of statutory duty for statements made during the said Syariah divorce proceedings?

[5] These are the issues that come immediately to mind:

(a) is a court appointed Hakam protected by judicial immunity?

(b) is this civil suit an abuse of the process of the court on the ground that the conduct of a court appointed Hakam is a matter exclusively within the jurisdiction of the Syariah Court under art 121(1A) Federal Constitution which reads 'The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts';

(c) is the civil suit a duplicity of proceedings as the appellant had filed a notice of appeal to the Kuala Lumpur Syariah High Court against the decision of the Kuala Lumpur Syariah Lower Court? and

(d) is the defence of absolute privilege based on judicial privilege also referred to as courtroom privilege available to the Hakam?

SALIENT BACKGROUND FACTS

[6] The salient background facts are as follows.

[7] The plaintiff and his former wife, Justynn Cassandra bt Mohamad Firdaus ('Justynn Cassandra') were the defendant and the plaintiff respectively in an acrimonious divorce proceeding in the Kuala Lumpur Syariah Lower Court ('Syariah divorce suit').

[8] The Kuala Lumpur Syariah Lower Court in the Syariah divorce suit ordered the divorce of the plaintiff and Justynn Cassandra.

[9] The plaintiff is unhappy with the divorce order and has filed a notice of appeal to the Kuala Lumpur Syariah High Court against the decision of the Kuala Lumpur Syariah Lower Court in the Syariah divorce suit. This appeal has yet to be heard.

COURT PROCEEDINGS

Two suits filed by the plaintiff at the KL Sessions Court

[10] Dissatisfied with the divorce order in the Syariah divorce suit the plaintiff, besides filing a notice of appeal to the Kuala Lumpur Syariah High

A Court against the decision of the Kuala Lumpur Syariah Lower Court, filed two suits at the Kuala Lumpur Sessions Court.

[11] The two defendants in both suits (consolidated by a sessions court order dated 7 January 2022) are the two Hakams appointed by the presiding judge of the Syariah divorce suit pursuant to s 48 of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) ('Act 303').

[12] The etymology of Hakam is Arabic. It has now entered into the vocabulary of the English language. It means an arbitrator or arbitration depending on context.

[13] Hakam (ie arbitration) is a dispute resolution mechanism that is based on Syariah. A Hakam (ie arbitrator) is given the power to resolve marital disputes, either through reconciliation or divorce/separation.

(See *Hakam and its Application in Divorce Cases in Selangor Syariah Courts* by Mumtazah bt Narowi, Noor Fadhzana Mohd Noor and Siti Amalina Ahmad Khairundin (Selangor Humaniora Review Vol 4 No 1, June 2021).)

[14] The defendant in Kuala Lumpur Sessions Court Suit No WA-B52NCVC-194–05 of 2021 Abdul Majid bin Abdul Rahman is the court appointed Hakam appointed for the plaintiff by the presiding judge of the Syariah divorce suit pursuant to s 48 of Act 303.

[15] The defendant in Kuala Lumpur Sessions Court Suit No WA-B52NCvC-193–05 of 2021 Abdul Hadi bin Hamad is the court appointed Hakam appointed for Justynn Cassandra by the presiding judge of the Syariah divorce suit pursuant to s 48 of Act 303.

[16] It is the plaintiff's pleaded case that the appointments and the functions of the two defendants as court appointed Hakams are provided under Act 303 and Practice Direction No 1/2006 issued by the Chief Justice of the Syariah Court via the Jabatan Kehakiman Syariah Malaysia.

[17] The plaintiff pleaded that during the Syariah divorce suit proceedings on 9 February 2021 the defendants as court appointed Hakams had issued statements which were malicious and false against him.

[18] The plaintiff further pleaded that in the performance of the defendants' functions as court appointed Hakams, the defendants had issued malicious and false statements against him in the Syariah divorce suit proceedings on

9 February 2021 and negligently breached their duties to him as Hakams as provided by the Practice Direction issued by the Syariah Chief Justice and in Act 303.

[19] It is the plaintiff's pleaded case that the conduct of the defendants while executing their duties as court appointed Hakams had led to the Kuala Lumpur Syariah Lower Court in the Syariah divorce suit to order the divorce of the plaintiff and Justynn Cassandra.

[20] The plaintiff pleaded that the acts of the defendants as court appointed Hakam had resulted in the divorce decision, pecuniary damage and/or loss suffered by him.

Defence filed by the defendants at the KL Sessions Court

[21] The two defendants filed their defence respectively via the Attorney General's Chambers and denied the allegations of the plaintiff.

[22] In their defences at para 13 of the defence of Abdul Hadi bin Hamad and at para 15 of the defence of Abdul Majid bin Abdul Rahman, the two defendants further pleaded, reproduced below in its original Malay language, as follows:

(a) Bahawa Mahkamah Sivil tidak ada bidangkuasa mendengar tindakan ini kerana ianya berbangkit daripada prosiding di Mahkamah Syariah yang mana segala tatacara dan prosedur yang dijalankan di Mahkamah Rendah Syariah tersebut adalah bersandarkan kepada undang-undang syariah dan peraturan di bawahnya termasuk proses rayuan dan/atau semakan;

(b) Bahawa terdapat beberapa prosiding semakan dan/atau rayuan telah difailkan oleh Plaintif iaitu Permohonan Semakan dalam Permohonan No. 14500–055–0007–2021 di Mahkamah Tinggi Syariah (Rayuan) Malaysia terhadap keputusan Mahkamah Rendah Syariah berkenaan prosiding penceraian tersebut dan satu lagi Permohonan Semakan dalam Permohonan No. 14500–003–0001–2021, antara lain untuk menyemak keputusan Mahkamah Syariah pada 06 January 2021;

(c) Bahawa tindakan ini adalah satu tindakan pra-matang apabila proses rayuan dan/atau semakan ke atas keputusan Mahkamah Rendah Syariah tersebut masih lagi berjalan di Mahkamah Tinggi Syariah dan segala kedudukan/status quo pihak-pihak di Mahkamah Rendah Syariah tersebut masih boleh diubah melalui satu proses rayuan dan/atau semakan;

(d) Tindakan ke atas Defendan atas kapasiti peribadinya adalah cacat dari sudut fakta dan undang-undang;

A (e) Tindakan oleh Plaintif ini adalah suatu penyalahgunaan proses mahkamah dan/atau undang-undang; dan

(f) Tindakan terhadap Defendan adalah dilindungi di bawah undang-undang yang terpakai.

B **[23]** The defendants filed a striking out application based on O 18 r 19 of the ROC 2012. The principal submissions of the defendants as set out in their written submissions at para 6, reproduced here, are as follows:

C (i) The entire action amounts to an abuse of the process of the court on the basis that the conduct of the defendants as the Court appointed Hakam were in the purview of jurisdiction of the Syariah Court. Consequently, as the matters are within the jurisdiction of the Syariah Court, the Civil Court has no jurisdiction and the entire action amounts to an abuse of court's process and must therefore be Struck Out.

D (ii) These two (2) actions amount to duplicity of proceedings with the filing of the notice of appeal to the Syariah High Court against the decision of the Syariah Court.

(iii) The plaintiff has submitted himself to the jurisdiction of the Syariah E Court by filing an Appeal and Stay of Execution against the decision of the Syariah Lower Court.

(iv) The alleged losses claimed by the plaintiff was as a result of the divorce held by the Syariah Court in which the decision is appealable and reviewable by the Syariah High Court.

F **[24]** The sessions court judge Tuan Shamsudin bin Abdullah agreed with the submissions of learned counsel for the defendants Mohd Ashraf bin Abd Hamid and allowed the striking out. His grounds of decision dated 25 June 2022 can be seen in the *rekod rayuan tambahan*.

G **[25]** The plaintiff thus appealed to me against the striking out of his two suits.

H **[26]** I propose to begin by setting out briefly the law on striking out and thereafter review the legal grounds relied on by the defendants in their striking out applications to see if the plaintiff's appeal should be allowed or dismissed.

I **[27]** The *locus classicus* on the test to be applied in an application to strike out under O 18 r 19 of the ROC 2012 was settled by the Supreme Court, the then apex court, way back in the year 1993 in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at pp 43–44; [1993] 4 CLJ 7 at p 11 e–h (SC). Mohamed Dzaiddin bin Hj Abdullah SCJ (delivering judgment of the court) said:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 *(which is in para materia with our* O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*). *The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable*. (Emphasis added.)

Striking out ground (a) — Is a court appointed Hakam protected by judicial immunity?

[28] The defence of judicial immunity is pleaded in para 13 of the defence of Abdul Hadi bin Hamad and at para 15 of the defence of Abdul Majid bin Abdul Rahman. The two defendants pleaded, reproduced below in its original Malay language, as follows:

> Tindakan terhadap Defendan adalah dilindungi di bawah undang-undang yang terpakai.

[29] In Malaysia, the concept of judicial immunity is no longer *terra incognita* (Latin for 'an unexplored country or field of knowledge'). The concept and its scope have been well analysed *in extenso* (Latin for 'at full length') in two leading cases on this area by the High Court's decisions in *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor* [2006] 1 MLJ 464 Vincent Ng J and in *Hodan-R Sdn Bhd v Dato' Mohd Hishamudin Hj Mohd Yunus* [2007] 2 CLJ 701 (HC), Ramly Ali J.

[30] In Malaysia, the concept of judicial immunity is derived both from statute and common law (see *Hodan-R Sdn Bhd v Dato' Mohd Hishamudin Hj Mohd Yunus* [2007] 2 CLJ 701 (HC), Ramly Ali J).

Judicial immunity in common law

[31] What, then, is Judicial immunity in common law? Why is it an important principle for a properly functioning democracy? What is its rationale?

[32] In essence, Judicial immunity means that any judge from the lowest to

the highest level of the judiciary (ie session court judge, magistrate, High Court, Court of Appeal and Federal Court judge) cannot be sued in any civil court for any act done, sentence meted out, words spoken or orders made by him in the discharge of his or her judicial duty. This immunity is also available to protect any other person acting judicially. Such persons include a registrar, deputy registrar and senior assistant registrar, when exercising their judicial functions or duties.

(See *Sirros v Moore and others* [1975] QB 118 (CA), *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor* [2006] 1 MLJ 464 Vincent Ng J and *Hodan-R Sdn Bhd v Dato' Mohd Hishamudin Hj Mohd Yunus* [2007] 2 CLJ 701 (HC), Ramly Ali J.)

[33] Judicial immunity is an important principle for a properly functioning democracy as a vibrant judiciary must have judges and persons acting judicially who are able to hear and decide disputes without fear or favour, regardless of (the involvement of) any party, sect or interest. They must have complete freedom to decide, knowing that a well-heeled litigant cannot harass them with frivolous suits for alleged negligence or breach of statutory duties. *The sword of Damocles* must not be allowed to hang over the heads of judges and persons acting judicially when performing their judicial tasks.

[34] Lord Denning MR in *Sirros v Moore and others* [1975] QB 118 (CA) at p 132, the leading English case on Judicial immunity in common law, explains Judicial immunity in these terms:

> Ever since the year 1613, if not before, it has been accepted in our law that *no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action*. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, *a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear*. It was well stated by Lord Tenterden CJ in *Garnett v Ferrand* (1827) 6 B & C 611, 625:
>
> > *This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.*

Those words apply not only to judges of the superior courts, but to judges of all ranks, high or low. Lord Tenterden CJ spoke them in relation to a coroner. They were reinforced in well-chosen language in relation to a county court judge by Kelly CB in *Scott v Stansfield* (1868) LR 3 Exch 220 223. (Emphasis added.)

[35] Lord Denning MR at p 136 went on to say:

Every judge of the courts of this land — from the highest to the lowest — should be protected to the same degree, and liable to the same degree. If *the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment,'* it applies to every judge, whatever his rank. *Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear*. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?' So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction — in fact or in law — but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. *Actions based on such allegations have been struck out and will continue to be struck out*. (Emphasis added.)

[36] The principles of judicial immunity in *Sirros v Moore and others* [1975] QB 118 have been followed in our courts. See *Law Hock Hua and Anor v Timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur* [2006] MLJU 347 where Rohana Yusuf JC struck out a suit against a Deputy Registrar for alleged failure to conduct an auction in accordance with the law on ground of judicial immunity, *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor* [2006] 1 MLJ 464 where Vincent Ng J struck out a suit filed against a sitting judge for alleged interference with the execution of a writ of seizure and sale and *Hodan-R Sdn Bhd v Dato' Mohd Hishamudin Hj Mohd Yunus* [2007] 2 CLJ 701 where Ramly Ali J struck out a suit filed against a sitting judge for alleged malice, case fixing, judicial misconduct and biasness.

[37] The acute issue that arises in this appeal is whether a court appointed Hakam is protected by common law judicial immunity. This issue has not been decided by Malaysian cases. Before I analyse this issue, I propose to set out the law on statutory Judicial immunity first.

Statutory judicial immunity

[38] Judicial immunity is a principle in common law. It is codified by our Legislature in the form of s 14 of the Courts of Judicature Act 1964.

(See *Law Hock Hua and Anor v Timbalan Pendaftar Mahkamah Tinggi Kuala*

Lumpur [2006] MLJU 347 Rohana Yusuf JC and *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor* [2006] 1 MLJ 464 Vincent Ng J.)

[39] Section 14 of the Courts of Judicature Act 1964 reads:

> 14 Protection of Judges and other judicial officers
>
> (1) *No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty*, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.
>
> (2) *No officer of any court* or other person bound to execute the lawful warrants or *orders of any Judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.* (Emphasis added.)

[40] I will first construe s 14(1) of the Courts of Judicature Act 1964 before I construe s 14(2) of the Courts of Judicature Act 1964.

Section 14(1) of the Courts of Judicature Act 1964

[41] Section 14(1) of the Courts of Judicature Act 1964 grants judicial immunity to a judge or other person acting judicially from being sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

[42] Section 14(1) of the Courts of Judicature Act 1964 can be divided into two limbs as follows:

(a) *no judge shall be liable to be sued in any civil court* for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of; and

(b) *no person acting judicially shall be liable to be sued in any civil court* for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

[43] Section 14(1) of the Courts of Judicature Act 1964 has been applied to

give immunity to judges, magistrates and registrars when performing their judicial duties.

(See *Law Hock Hua and Anor v Timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur* [2006] MLJU 347, Rohana Yusuf JC; *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen & Anor* [2006] 1 MLJ 464 Vincent Ng J; *Hodan-R Sdn Bhd v Dato' Mohd Hishamudin Hj Mohd Yunus* [2007] 2 CLJ 701 Ramly Ali J; and *Ho Kok Thin & Ors v The Sheriff/Registrar of the High Court Borneo & Anor* [1989] 3 MLJ 181 Haidar J.)

[44] Section 14(1) of the Courts of Judicature Act 1964 has also been applied to give immunity to every member of the Advisory Board constituted under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (see *Tee Yam @ Koo Tee Yam v Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2005] 5 MLJ 645, Jeffrey Tan J).

[45] As stated above, the acute issue that arises in this appeal is whether a court appointed Hakam is protected by statutory judicial immunity in the form of s 14 of the Courts of Judicature Act 1964. This issue has not been decided by Malaysian cases.

[46] The first limb in s 14(1) of the Courts of Judicature Act 1964 reads 'No Judge shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty'.

[47] Under s 3 of the Courts of Judicature Act 1964 'Judge' means a Judge of the Federal Court, of the Court of Appeal or of the High Court and includes the Chief Justice, the President and a Chief Judge. Thus, a Hakam is not a judge as defined and a Hakam does not come within the protection of the first limb in s 14(1) of the Courts of Judicature Act 1964.

[48] But can a Hakam come within the second limb of s 14(1) of the Courts of Judicature Act 1964?

[49] The second limb of s 14(1) of the Courts of Judicature Act 1964 reads as follows 'No person *acting judicially* shall be liable to be sued in *any civil court* for any act done or ordered to be done by him *in the discharge of his judicial duty,* whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of'. (Emphasis added.)

[50] In my view, a Hakam can come within the second limb of s 14(1) of the

Courts of Judicature Act 1964 if he is a 'person acting judicially in the discharge of his judicial duty'.

[51] I am fortified in my view by the decision in *Tee Yam @ Koo Tee Yam v Timbalan Menteri, Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2005] 5 MLJ 645 by Jeffrey Tan J which I have referred to above. In *Tee Yam* at [56], s 14(1) of the Courts of Judicature Act 1964 was applied to give immunity to every member of the Advisory Board constituted under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 for any act done or ordered to be done by them in the discharge of their advisory board duty.

[52] My view is further supported by the following passage in *Hodan-R Sdn Bhd v Dato' Mohd Hishamudin Hj Mohd Yunus* [2007] 2 CLJ 701 where Ramly Ali J said:

> [32] *Section 14(1) of the Malaysian Courts of Judicature Act 1964 covers* any 'judge' (which refers to judges of the Superior Courts) as well as '*other person acting judicially' (which includes Session Court judges, Magistrate, Registrar as well as Deputy Registrar and Senior Assistant Registrar, exercising their judicial functions or duties).* The protection covers 'any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limit of his jurisdiction.' However, in order for this protection not to be abused by those persons 'protected' under the section, he must 'at the time in good faith believed himself to have jurisdiction to do so or order the act complained of'. (Emphasis added.)

[53] The acute issue thus is whether a court appointed Hakam is protected by the second limb of s 14(1) of the Courts of Judicature Act 1964 on the ground that he a 'person acting judicially in the discharge of his judicial duty'.

[54] Before I analyse this issue, for completeness, I propose to analyse s 14(2) of the Courts of Judicature Act 1964 first.

Section 14(2) of the Courts of Judicature Act 1964

[55] Section 14(2) of the Courts of Judicature Act 1964 further grants immunity to an *officer of any court or other person bound to execute the* lawful warrants or orders of any judge or other person acting judicially from being sued in *any civil court* for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

[56] The Courts of Judicature Act 1964 sometimes uses the small 'c' for 'court' and sometimes the big 'C' for 'Court'. Instances where it uses the big 'C' for 'Court' are ss 7, 12(2), 14(3), 15 and 16. Instances where it uses the small 'c' for 'court' are ss 14(1), 14(2), 14(3), 16(b) and Schedule, paras 5, 11 and 17.

[57] It is significant that s 14(2) uses the small 'c' for 'court' and not the big 'C' for 'Court'. This is because under s 3 of the Courts of Judicature Act 1964 the word 'Court' has been defined to mean the Federal Court, the Court of Appeal or the High Court, as the case may require. The intention of the Legislature therefore must be that judicial immunity is not confined to officers of the Federal Court, the Court of Appeal or the High Court but extends to officers of 'any court' including the sessions court, magistrates court and Syariah courts.

[58] Therefore, can a Hakam come within s 14(2) of the Courts of Judicature Act 1964 which reads:

> *No officer of any court* or other person bound to execute the lawful warrants or *orders of any Judge* or other person acting judicially *shall be liable to be sued in any civil court for the execution of any* warrant or *order which he would be bound to execute if within the jurisdiction of the person issuing the same*. (Emphasis added.)

[59] Next I propose to review the role play by a court appointed Hakam in Syariah divorce proceedings and the relevant legislation before I consider whether a Hakam is protected by common law judicial immunity and/or the second limb of s 14(1) and/or s 14(2) of the Courts of Judicature Act 1964 and therefore entitled to judicial immunity.

The law on Hakam in the Federal Territories

[60] The law governing the appointment, scope of duty and conduct of a Hakam in the Federal Territories can be found in:

(a) the Islamic Family Law (Federal Territories) Act 1984 (Act 303); and

(b) Practice Direction No 1/2006 issued by the Chief Justice of the Syariah Court via the Jabatan Kehakiman Syariah Malaysia.

The Islamic Family Law (Federal Territories) Act 1984 (Act 303)

[61] Section 48 of Act 303 provides as follows:

> 48 Arbitration by Hakam
>
> (1) *If satisfied that there are constant quarrels (shiqaq) between the parties to a marriage, the Court may appoint in accordance with Hukum Syarak two arbitrators or Hakam to act for the husband and wife respectively.*
>
> (2) In appointing the Hakam under subsection (1), the Court shall, where possible, give preference to close relatives of the parties having knowledge of the circumstances of the case.
>
> (3) *The Court may give directions to the Hakam as to the conduct of the*

arbitration and they shall conduct it in accordance with such directions and Hukum Syarak.

(4) If the Hakam are unable to agree, or *if the Court is not satisfied with their conduct of the arbitration, the Court may remove them and appoint other Hakam in their place.*

(5) *The Hakam shall endeavour to obtain from their respective principals full authority, and may, if their authority extends so far, pronounce one talaq before the Court if so permitted by the Court*, and in that event the Court shall record that pronouncement of one talaq, and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(6) *If the Hakam are of the opinion that the parties should be divorced but are unable for any reason to order a divorce, the Court shall appoint other Hakam and shall confer on them authority to order a divorce* and shall, if they do so, record the order and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(7) Unless he is a close member of the family of the parties, no person or Peguam Syarie shall be allowed to be present or represent any of the parties in the presence of the Hakam.

The Syariah Court practice direction No 1/2006

[62] The Syariah Court practice direction No 1/2006 dated 13 Rabiulawwal, 1427H/12 April 2006M provides in its original Malay language as follows:

AMALAN HAKAM MAHKAMAH SYARIAH

Ketua Hakim Syarie menetapkan Amalan Hakam Mahkamah Syariah seperti berikut;

1. Syarat-syarat seorang Hakam

(1) Hakam hendaklah terdiri daripada kalangan kaum kerabat daripada pihak suami dan pihak isteri yang pada pendapat Mahkamah mempunyai syarat-syarat atau kelayakan mengikut Hukum Syarak.

(2) Mahkamah boleh melantik orang lain yang mempunyai kelayakan mengikut Hukum Syarak.

2. Tanggungjawab Hakam

Hakam hendaklah menerima arahan Hakim bagi melaksanakan tanggungjawabnya di sisi Mahkamah antaranya seperti berikut:-

(a) setiap hakam hendaklah memanggil prinsipal masing-masing bagi memperolehi punca-punca pertikaian.

(b) kedua-dua hakam hendaklah mengadakan pertemuan dan mengenal pasti serta mencari penyelesaian secara sulh.

(c) sekiranya pihak-pihak gagal menerima penyelesaian secara sulh, hakam hendaklah berusaha memperolehi kuasa daripada prinsipal masing-masing sama ada melafazkan talaq atau secara khulu';

(d) *melaporkan kepada Mahkamah hasil siasatan tersebut, bahawa didapati tiada perdamaian atau tiada keizinan daripada prinsipal untuk penceraian dan mencadangkan kepada Mahkamah supaya melantik Hakam lain untuk diberi kuasa penceraian.*

3. Sabitan Syiqaq

Mahkamah hendaklah mensabitkan syiqaq sentiasa berlaku dalam keadaan-keadaan tertentu termasuklah antaranya:-

(a) perbalahan di antara suami isteri itu kadangkala terbitnya dengan sebab nusyuz isteri, atau dengan sebab kezaliman suami, atau dengan terbit kesamaran siapa yang benar di antara kedua-duanya atau berpunca dari kedua-duanya, berdusta atau menuntut yang bukan hak;

(b) perbalahan di antara suami isteri dan sukar keduanya menjalankan aturan Allah yang ditetapkan atas suami isteri itu, tuduh menuduh mengenai masing-masing tidak melaksanakan hak-hak sebagai suami isteri;

(c) isteri atau suami menuduh di antara keduanya berkawan dengan perempuan/lelaki yang telah melampaui hukum syarak;

(d) sering berlaku pertikaian hingga pukul memukul;

(e) salah seorang keluar dari rumah kediaman, tidak tinggal bersama sedangkan punca sebenar tidak dapat dibuktikan oleh kedua-dua belah pihak di hadapan mahkamah;

(f) tuduh menuduh di antara suami isteri mengenai anak-anak berkaitan dengan tanggungjawab masing-masing sehingga berlaku pertengkaran dan perselisihan yang berpanjangan;

(g) jika didapati bahawa aduan isteri itu tidak sabit dan ditolak Mahkamah dengan sebab ia tidak dapat membuktikan kebenarannya dan kemudian daripada itu isteri berulang-ulang membuat aduan dan Mahkamah mendapati pertikaian sentiasa berlaku di antara suami isteri tersebut;

(h) apa-apa tindakan yang menyebabkan darar syarie ke atas isteri;

4. Tatacara Pelantikan Hakam

(1) Sebelum melantik Hakam Mahkamah hendaklah —

(a) mensabitkan syiqaq sentiasa berlaku antara suami isteri di hadapannya.

(b) mengarahkan suami dan isteri mengemukakan seorang wakil dari pihak masing-masing kepada Mahkamah yang sesuai dan layak dilantik sebagai Hakam dalam tempoh 14 hari dari tarikh perintah dengan menggunakan Borang AH 1;

(c) setelah kedua-dua pihak mengemukakan nama-nama wakil kepada

Mahkamah, hakim hendaklah melantik dan mengisytiharkan sebagai hakam bagi kedua-dua pihak. Jika pihak-pihak gagal mengemukakan wakil masing-masing, Mahkamah akan melantik seorang hakam bagi setiap pihak seperti dalam Borang AH2;

(d) jika salah satu pihak gagal mengemukakan wakil, Mahkamah mempunyai kuasa untuk melantik hakam bagi pihak yang gagal mengemukakan wakil tersebut, tertakluk kepada syarat-syarat di dalam Arahan 1.

5. Tatacara dan tempoh perjalanan penimbangtaraan

(1) Sesuatu tempoh perjalanan penimbangtaraan pada peringkat permulaan tidaklah boleh dilangsungkan lebih daripada satu bulan dari tarikh perintah perlantikan Hakam;

(2) Mahkamah boleh atas budibicaranya melanjutkan tempoh perjalanan penimbangtaraan jika difikirkan patut tidak melebihi satu bulan jika had masa yang diberikan di dalam sub Arahan (1) tidak dapat dipenuhi;

(3) Hakam peringkat ini tidak berkuasa menceraikan suami isteri kecuali dengan keizinan kedua belah pihak suami isteri tersebut;

(4) Jika Mahkamah tidak berpuas hati dengan cara salah seorang atau kedua-dua Hakam menjalankan penimbangtaraan itu, Mahkamah boleh memecat salah seorang atau kedua-dua mereka dan melantik Hakam lain sebagai ganti;

(5) Kuasa penuh daripada prinsipal mengikut subseksyen 48(5) Akta Undang-undang Keluarga Islam hendaklah diberikan kepada Hakam dengan menggunakan Borang AH3;

(6) Mahkamah hendaklah memanggil pihak-pihak ke Mahkamah pada masa, tarikh dan tempat yang ditentukan dan pada peringkat ini, Hakim boleh membenarkan Hakam melafazkan talaq atau khulu';

(7) *Jika Hakam tidak mendapat kuasa penuh daripada prinsipal mereka sepertimana sub Arahan 5, Mahkamah hendaklah melantik Hakam lain dan hendaklah memberi kuasa kepada Hakam menceraikan isteri itu dengan khulu' seperti dalam borang AH6;*

(8) *Mahkamah boleh membatalkan pelantikan mana-mana Hakam pada bila-bila masa sekiranya tidak berpuashati dengan cara pelaksanaan penimbangtaraan atau atas apa–apa sebab yang difikirkan munasabah oleh Mahkamah.*

(9) Mahkamah boleh atas budibicaranya melanjutkan tempoh perlaksanaan Hakam jika difikirkan patut tidak melebihi tempoh satu bulan jika had masa yang diberikan di dalam sub Arahan 2 tidak dapat dipenuhi. (Emphasis added.)

Application of law to facts

Common law judicial immunity

[63] I am of the view a court appointed Hakam is protected by common law judicial immunity as the said Hakam is acting judicially in the discharge of his judicial duty when he arbitrates between the divorcing couple in arriving at his recommendation whether or not to order a divorce under Syariah law pursuant to s 48 of Act 303 and the Syariah Court practice direction No 1/2006.

[64] It is clear from the two statements of claim filed by the plaintiff at para 13 that the acts of the defendants as court appointed Hakams that he is complaining of were acts committed during the Syariah divorce suit proceedings. Therefore, the acts were committed when the defendants were acting judicially in the discharge of their judicial duty.

[65] The defendants are therefore protected by common law judicial immunity.

Statutory judicial immunity

[66] Pursuant to s 48 of Act 303 and the Syariah Court Practice Direction No 1/2006 if satisfied that there are constant quarrels (*shiqaq*) between the parties to a marriage:

(a) The Syariah Court judge may appoint in accordance with Hukum Syarak two arbitrators or Hakam to act for the husband and wife respectively.

(b) The Syariah Court judge may give directions to the Hakams as to the conduct of the arbitration and they shall conduct it in accordance with such directions and Hukum Syarak. The Hakams shall endeavour to obtain from the husband and wife full authority, and may, if their authority extends so far, pronounce one talaq before the Court if so permitted by the Syariah Court judge, and in that event the Syariah Court judge shall record that pronouncement of one talaq, and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(c) If the two Hakams are of the opinion that the parties should be divorced but are unable to obtain consent from the husband and wife to order a divorce, they can recommend to the Syariah Court Judge to appoint other Hakams and to confer on them authority to order a divorce and shall, if they do so, record the order and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

[67] Based on the authority conferred pursuant to s 48 of Act 303 and the Syariah Court practice direction No 1/2006 on the Hakam as well as his duty when arbitrating constant quarrels (*shiqaq*) between the parties to a marriage, whether the couple should or should not be granted a divorce as set out above,

I am of the view a Hakam is a person *acting judicially* in the discharge of his judicial duty in the Syariah court proceedings.

[68] Therefore, under s 14(1) of the Courts of Judicature Act 1964 which reads 'No person *acting judicially* shall be liable to be sued in *any civil court* for any act done or ordered to be done by him *in the discharge of his judicial duty*' a Hakam is entitled to judicial immunity.

[69] I am further of the view that a Hakam comes within s 14(2) of the Courts of Judicature Act 1964 which reads:

> *No officer of any court or other person bound to execute the* lawful warrants or *orders of any Judge* or other person acting judicially *shall be liable to be sued in any civil court for the execution of any* warrant or *order which he would be bound to execute if within the jurisdiction of the person issuing the same*.

[70] This is because a Hakam is an officer of a Syariah Court and he is executing the lawful *orders of a Syariah Court judge*. A Hakam is therefore also entitled to judicial immunity under s 14(2) of the Courts of Judicature Act 1964.

[71] In conclusion, the defendants here as Hakams are entitled to judicial immunity at common law and also entitled to statutory judicial immunity under s 14(1) and (2) of the Courts of Judicature Act 1964.

[72] On this ground alone, the writs should be struck out and therefore the appeal should be dismissed.

Additional striking out grounds — Abuse of process, duplicity of proceedings and lack of jurisdiction

[73] The submissions of the defendants on the above grounds as set out in their written submissions at para 6, reproduced here, are as follows:

(a) the entire action amounts to an abuse of the process of the court on the basis that the conduct of the defendants as the court appointed Hakam were in the purview of jurisdiction of the Syariah Court. Consequently, as the matters are within the jurisdiction of the Syariah Court, the Civil Court has no jurisdiction and the entire action amounts to an abuse of court's process and must therefore be struck out;

(b) these two actions amount to duplicity of proceedings with the filing of the notice of appeal to the Syariah High Court against the decision of the Syariah Court;

(c) the plaintiff has submitted himself to the jurisdiction of the Syariah Court by filing an appeal and stay of execution against the decision of the Syariah Lower Court; and

(d) the alleged losses claimed by the plaintiff was as a result of the divorce held by the Syariah Court in which the decision is appealable and reviewable by the Syariah High Court.

[74] As these grounds are inter-related I will consider them together.

[75] The plaintiff has filed an appeal to the Syariah High Court and apply for a stay of execution against the decision of the Syariah Lower Court. In my view, the said appeal must necessarily be against the recommendation for divorce and alleged falsehoods uttered by the Hakams.

[76] Therefore, there is a clear duplicity of proceedings. It is undesirable that two different courts are asked to decide on the same or similar issues (see *Oversea-Chinese Banking Corporation Ltd v National Union of Bank Employees & Ors* [1985] 1 MLJ 439 Wan Hamzah J and *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184 (SC)).

[77] Therefore, on this ground of duplicity of proceedings, this appeal should also be dismissed.

[78] On the issue of jurisdiction, the submission of the defendants is that the civil courts have no jurisdiction to hear the plaintiff's suit. The plaintiff in reply had contended that the civil courts have jurisdiction to hear his suit as the Syariah Court is not empowered to grant the reliefs he had prayed for in this civil suit.

[79] The defendants contend the issue of jurisdiction is centred on whether one adopts the 'subject matter' approach or the 'remedy prayed for' approach. The defendants contend the courts have adopted the 'subject matter' approach. The defendants rely on *Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor* [2004] 2 MLJ 529 (FC) and *Roshini Ochie bt Mohd Melvyn v Ketua Pendaftar Mahkamah Syariah Wilayah Persekutuan & Ors* [2021] MLJU 2263 (HC) and affirmed by the Court of Appeal on 8 March 2022 though grounds of judgment are not available as yet.

[80] The plaintiff disagrees and contends that the civil courts have jurisdiction to hear his suit. He relies on *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (FC) at pp [71]–[76] (see appellant's written submissions dated 1 September 2022,

encl 19 at paras 58(2)–(3) and appellant's reply submission in reply dated 12 September 2022 at para [7].

[81] As I have held this appeal can be dismissed based on other grounds set out above, I need not decide on this ground in this appeal.

Is the defence of absolute privilege based on judicial privilege also referred to as courtroom privilege available to the Hakam?

[82] A defence also available to the Hakam is the defence of absolute privilege.

[83] This defence of absolute privilege is pleaded in para 13 of the defence of Abdul Hadi bin Hamad and at para 15 of the defence of Abdul Majid bin Abdul Rahman, though it could have been better drafted. The two defendants pleaded, reproduced below, as follows:

> Tindakan terhadap Defendan adalah dilindungi di bawah undang-undang yang terpakai.

[84] A defence of absolute privilege is a complete bar to an action for defamation. This is so notwithstanding how false or malicious the words complained of may be. The defence of absolute privilege is different from that of qualified privilege. Absolute privilege cannot be destroyed or watered down by malice (see *BHLB Trustee Bhd & Anor v HSBC (M) Trustee Bhd & Ors* [2006] 4 MLJ 48 Abdul Malik Ishak J at para [15]).

[85] In this appeal the defence of absolute privilege is based on judicial privilege also known as courtroom privilege. This defence is available to the Hakams as it is clear from the two statements of claim filed by the plaintiff at para 13 that the acts of the defendants as Hakams that he is complaining of were acts committed during the Syariah divorce suit proceedings.

[86] The defence of absolute privilege based on judicial privilege also referred to as courtroom privilege is available to the Hakams as it covers all matters that are done *coram judice* (Latin for 'before a judge having jurisdiction'). This extends to everything that is said or done in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence (see *Lincoln v Daniels* [1961] 3 All ER 740 at p 749, Devlin LJ).

[87] Put in a nutshell, no one can sue in a civil court the judge, the Hakam, the parties, the counsel or the witnesses for all matters that are said or done *coram judice* in a Syariah court proceedings. That includes everything that is

said or done in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence in a Syariah court proceedings.

[88] The basis of the rule according to Sellers LJ in *Lincoln v Daniels* [1961] 3 All ER 740 at p 743 is:

> There is no doubt that in a court of law the observations of the judge, counsel, parties and witnesses are the subject of absolute privilege. This was established clearly in 1883 in *Munster v Lamb* where the existing authorities were reviewed by the court. The basis of the rule was succinctly stated by Fry LJ ((1883), 11 QBD at p 607):
>
> > *The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood.* It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. *It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions*. (Emphasis added.)

[89] The passage above on the policy reasons for absolute privilege to be applied to proceedings in courts of law by Fry LJ in *Munster v Lamb* (1883) 11 QBD 588 was again reiterated by Brooke LJ in *Mahon and another v Rahn and others (No 2)* [2000] 2 All ER (Comm) 1 at paras [145]–[146].

[90] In the useful case of *Harcharan Singh a/l Sohan Singh v Ranjit Kaur a/p S Gean Singh* [2010] MLJU 1079 Chew Soo Ho JC has this to say on the subject of absolute privilege and *coram judice*:

> In *Lincoln v Daniels* [1961] 3 All ER 740, Devlin, LJ in delivering his decision in the English Court of Appeal had classified 3 categories of proceedings in or before a court of justice that were covered by absolute privilege as follows (at p 749):
>
> > How, then, is it contended that its proceedings are affected by the absolute privilege enjoyed by the Bench of an Inn? The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories.
> >
> > The first category covers all matters that are done *coram judice*. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence.
> >
> > The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into

existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings.

The third category is the most difficult of the three to define. It is based on the authority of *Watson v Mc Ewan*, in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v White*, the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

[91] On this ground of absolute privilege based on judicial privilege also referred to as courtroom privilege, this appeal should also be dismissed.

DECISION

[92] For the reasons above, I dismiss the appeal with costs subject to allocatur.

[93] For the record, I wish to express my appreciation to counsel Abdul Razak Muhidin and Mohd Ashraf bin Abd Hamid (federal counsel) as well as to all the co-counsel and solicitors who have assisted in this hearing for their helpful submissions.

Appeal dismissed with costs subject to allocatur.

Reported by Dzulqarnain Ab Fatar